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No. 99-210

In the Supreme Court of the United States

HOSPITAL SERVICE DISTRICT NO. 1
OF TANGIPAHOA PARISH, ET AL.,
Petitioners,

v.

SURGICAL CARE CENTER OF HAMMOND,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether local antitrust immunity arises (i) only when state law provides a specific grant of statutory authority that "displaces competition" and "necessarily contemplates" the challenged anticompetitive activity (as the Fifth Circuit held here), or instead (ii) when the local government's anticompetitive conduct could be "reasonably foreseen" from a state's broad grant of authority (as the Fourth and Eleventh Circuits hold)?

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters in all 50 States. WLF regularly appears in legal proceedings before federal and State courts to defend and promote free enterprise and individual rights. WLF has appeared before this Court in cases involving federalism. *See, e.g.*, *Reno* v. *Condon*, No. 98-1464; *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). WLF submits this brief in support of Petitioners and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

STATEMENT

In the interest of judicial economy, WLF incorporates by reference the factual statement as it appears in the petition for writ of certiorari. Additionally, we wish to emphasize certain aspects of the record. The consolidated petition centers on three judgments of the U.S. Court of Appeals for the Fifth Circuit: *Hospital Service District No. 1 of Tangipahoa Parish, et al.* v. *Surgical Care Center of Hammond, L.C.*, 153 F.3d 220 (5th Cir. 1999) (*Tangipahoa Parish*); *City of Bossier City, et al.* v. *Willis-Knighton Medical Center*, Pet. App. 33 (unpublished opinion);[2] and *Richland Parish Hospital Service District 1-B, et al.* v. *Ralph Abraham, M.D., et al.*, *Id.* at 53 (unpublished opinion). Because

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, contributed monetarily to the preparation and submission of this brief.

[2] Pursuant to SUP. CT. R. 46.1 *City of Bossier City, et al.* v. *Willis-Knighton Medical Center* was dismissed on September 21, 1999. No further discussion of that case is therefore necessary.

Tangipahoa Parish is the lead case on which the Fifth Circuit relied to resolve all three, we will rehearse only its facts.

Petitioner Hospital Service District No. 1 of Tangipahoa Parish d/b/a North Oaks Medical Center (North Oaks) is a political subdivision of the State of Louisiana. *See* LA. REV. STAT. ANN. § 46:1064(a); *Bertrand* v. *Sandoz*, 255 So. 2d 754 (La. 1971). It operates a hospital in Hammond, Louisiana, which offers a variety of medical services, including inpatient and outpatient surgery. *See* Pet. 7. Respondent Surgical Care Center of Hammond, L.C., d/b/a St. Luke's SurgiCenter (St. Luke's) is a for-profit hospital "located a quarter mile from North Oaks" that offers many of the same services as North Oaks, but solely on an outpatient basis. *Id.*

St. Luke's filed a complaint against North Oaks in U.S. District Court, accusing North Oaks of violating the Sherman Act, 15 U.S.C. § 1, and State laws governing monopolies, LA. REV. STAT. ANN. § 51:123, unfair trade practices, *id.* at § 15:1405, and consumer protection, *id.* at § 15:1409. *See* Pet. 7–8. In particular, the complaint charged that North Oaks had engaged in illegal tying arrangements by using its alleged monopoly over inpatient services to goad five of the seven largest local managed care plans into signing exclusive contracts. *Id.* at 8.

St. Luke's complaint was dismissed. *Id.* The court ruled, "The plain language of [Louisiana's Hospital Service District Law] authorizes hospitals to contract with any entity to promote the delivery of health services. North Oaks has seen fit to do this by entering into exclusive contracts with health care plans whenever possible." Pet. App. 28. According

to the court, North Oaks' exclusive contracts and other alleged anticompetitive activity were "an entirely foreseeable result of the Louisiana legislation." *Id.* As such, North Oaks' conduct was merely an "attempt to cure the competitive disadvantage suffered by the hospital service districts, the stated goal of the 1984 'competition' amendments." *Id.* St. Luke's appealed, and a panel of the Fifth Circuit unanimously affirmed. *See id.* at 19.

The Fifth Circuit then granted *en banc* review and reversed, holding that the Louisiana Hospital District Law, LA. REV. STAT. ANN. § 46:1051 (HSD law), did not entitle North Oaks to immunity from St. Luke's federal antitrust claim. "The Louisiana legislature did not make sufficiently clear an intent to exercise its authority to insulate its creature of state government from the constraints of the Sherman Antitrust Act . . . ." Pet. App. 2.

The court found the key to deciding the case in the "distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitve activity from one that merely allows a municipality to do what other businesses can do." *Id.* at 7. The court defended this distinction as a servant of federalism.

> First, courts will not police states to insist that its legislatures use words federally dictated. We will find a purpose to insulate local government when language and context fairly locate a state policy to displace competition. Second . . . courts will not infer such a policy to displace competition from naked grants of authority. . . . To infer a policy to displace competition from, for example, authority to

> enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant.

Id. at 9–10.

Applied to *Tangipahoa Parish*, the court concluded that this distinction cut against North Oaks' claim of immunity. It found that "[t]he Louisiana statute did not subject St. Luke's or any other businesses to the authority of the hospital service district." *Id.* at 7. And it reasoned that since "[n]ot all joint ventures are anticompetitive . . . it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct." *Id.* The court therefore reversed and remanded. Soon afterward it relied on *Tangipahoa Parish* as authority for deciding *Richland Parish Hospital Service District 1-B, et al.* v. *Ralph Abraham, M.D., et al.*, *id.* at 53, in a short, per curiam, unpublished decision. Petitioners subsequently filed a consolidated petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

The Fifth Circuit has held that State political subdivisions enjoy immunity from federal antitrust claims only if a State statute "necessarily contemplates the anticompetitive activity." Pet. App. 7. This decision deserves plenary review for at least three reasons. First, it raises a true conflict among four circuits around the country. Second, that conflict centers on a point of federal law of deep importance

to federal-state relations and local self-government. Determining precisely when the States' political subdivisions can obtain federal antitrust immunity shapes the relationship between States and their political subdivisions, as the former decide when and how to confer such immunity on the latter. The legal standard governing local antitrust immunity also affects how deeply federal courts will become enmeshed in overseeing local government operations and whether local government can remain creative and fully responsive to local needs. Third, the decision below also harbors serious errors that call for this Court's correction.

REASONS FOR GRANTING THE WRIT

A "compelling reason[ ]," SUP. CT. R. 10, for granting a petition for certiorari arises when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* at 10(a). Distinguished commentators have identified intercircuit conflicts as an especially strong reason for granting review. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 168 (7th ed. 1993). Even so, not all intercircuit conflicts merit review. Justice Harlan wrote that "a conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone." John Marshall Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108 (1959), *quoted in* STERN, SUPREME COURT PRACTICE, at 169. "What

may be necessary, therefore, is a conflict on an important issue—or at least not too unimportant an issue." *Id.* at 171. The conflict at issue in this case amply satisfies that test.

I. THE QUESTION PRESENTED, WHICH TURNS ON A BONA FIDE CONFLICT AMONG FOUR U.S. COURTS OF APPEALS, MERITS REVIEW BECAUSE IT INVOLVES IMPORTANT MATTERS OF FEDERALISM AND LOCAL SELF-GOVERNMENT

The Fifth Circuit has held that State political subdivisions get local antitrust immunity only if a State statute "necessarily contemplates the anticompetitve activity," Pet. App. 7, rather than "merely allow[ing] a municipality to do what other businesses can do." *Id.* This holding creates a direct conflict among four federal courts of appeals. To one side stand the decisions of the Fifth Circuit in this case and the Ninth Circuit in *Lancaster Community Hospital* v. *Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). On the other side stand the decisions of the Fourth Circuit in *Coastal Neuro-Psychiatric Associates* v. *Onslow Memorial Hospital*, 795 F.2d 340 (4th Cir. 1986) and the Eleventh Circuit in *FTC* v. *Hospital Board of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1994). Encompassing four circuits and touching diverse areas of the Nation, this conflict is intolerable because it is both direct and widespread. Furthermore, the conflict centers on a point of law with broad and deep implications for federalism and local self-government. To better explain those implications, it is helpful to begin by reviewing why States enjoy immunity from federal antitrust claims in the first place.

Fifty-six years ago this Court recognized that the Sherman Act, 15 U.S.C. § 1, which declares unlawful "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," *id.*, does not embrace claims premised on "the anticompetitive conduct of a State acting through its legislature." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985). In a frequently cited passage the Court explained why federal antitrust claims do not cover the actions of State governments.

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. *Brown*, 317 U.S. 341, 350–51 (1943). The Court has understood *Parker* as being "grounded in principles of federalism," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992), and it has consistently affirmed that understanding. *See, e.g.*, *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 370 (1991); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987); *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985); *Community Communications Co.*, v. *Boulder*, 455 U.S. 40, 53 (1982).

While States merit *Parker* immunity directly, however, their political subdivisions receive such

protection from antitrust liability only if their anticompetitive conduct is the "'foreseeable result' of what the [State] statute authorizes." *City of Columbia*, 499 U.S. at 373. By focusing the inquiry on whether a State legislature has authorized a political subdivision to engage in anticompetitive conduct, the Court has attempted to walk a tightrope between "preserv[ing] to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion of Brennan, J.), and not allowing "purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 416. An intercircuit conflict over the correct standard for distinguishing valid from invalid assertions of *Parker* immunity by States' political subdivisions thus carries profound implications for federalism. *See* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 222b, at 393 (rev. ed., 1997).

A. The Question Presented Involves Important Matters Regarding Federalism and Local Self-Government

Several reasons distinguish the Question Presented as being especially important. The standard of local antitrust immunity affects the entire range of State political subdivisions, including cities, towns, water and sewer districts, hospital districts, and every other political subdivision capable of being sued under federal antitrust law and of being shielded from suit under *Parker*. All these will decide how to deliver government services—and even whether they can deliver certain services at all—based in part on

whether they can safely avoid antitrust liability under federal law.

The Question Presented is also important because the standard governing local antitrust immunity has the power to shape the relationship between States and their political subdivisions. *See, e.g.*, *Community Commun. Co.* v. *City of Boulder*, 455 U.S. 40, 70, 71 (1982) (Rehnquist, J., dissenting). Framed one way, that standard may saddle State governments with requirements that impede or delay their ability to delegate to their political subdivisions the authority to engage in anticompetitive conduct in order to deliver government services. Framed another, it may free States and local governments to deliver government services in ways that creatively and responsively meet the needs of the people they serve. *See City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 439–40 (Stewart, J., dissenting).

The Question Presented is important, as well, because it affects the actual delivery of government services. Ordinarily, "States are accorded wide latitude in the regulation of their local economies under their police powers," *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976), meaning that federal decisional law will not lightly "displace[ ] state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require" *National League of Cities* v. *Usery*, 426 U.S. 833, 847 (1976), *overruled on other grounds by Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The difficulty lies with the fact that "[i]n the exercise of their powers local governmental entities often take actions that might violate the antitrust laws if taken by private persons, such as granting exclusive franchises, enacting restrictive

zoning ordinances, and providing public services on a monopoly basis." *City of Lafayette*, 435 U.S. at 439 (Stewart, J., dissenting). By adopting an overly cramped standard of local antitrust immunity, federal courts may halt social and economic experimentation by State political subdivisions, contrary to this Court's longstanding conviction that such creativity benefits the entire Nation.

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

New State Ice Co. v. *Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

As this passage from Justice Brandeis suggests, the Question Presented is important because it touches on particularly sensitive areas concerning the interaction between federal courts and State and local governments. Unnecessarily discouraging governmental experimentation not only may prevent beneficial experiments from being tried, it is equally troubling because it permits federal courts to reverse the considered judgments of State and local officials on less than compelling legal grounds. Accordingly, Members of the Court have recognized that "extensive

interference with the fundamentals of state government is not a proper function of the federal judiciary." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 438 (1978) (Stewart, J., dissenting). Armed with a cramped definition of local antitrust immunity, an overactive judge can find opportunities for such interference almost constantly, including whenever "a city grants an exclusive franchise, or chooses to provide a service on a monopoly basis, or refuses to grant a zoning variance to a business, or even . . . brings litigation on behalf of its citizens . . . ." *Id.* That is why Members of the Court have concluded that a grudging rule of local antitrust immunity openly invites "the sort of wide-ranging inquiry into the reasonableness of state regulations that this Court has forsworn." *Id.* at 439.

The importance of the Question Presented is also borne out by the presence of an unsettled subsidiary issue. As hospital service districts organized pursuant to Louisiana law, *see* LA. REV. STAT. ANN. § 46:1064(a), Petitioners are by definition commercial participants in the medical care market. This naturally raises the question whether *Parker* immunity applies to the political subdivision of a State when it acts as a market participant. The Court's case law is in some tension on this point. In *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365 (1991), the Court noted in passing that *Parker* appeared to say that antitrust immunity "does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Id.* at 374–75. Later in the opinion, however, it referred only to "the *possible* market participant exception." *Id.* at 379 (emphasis added). That possibility appears to depend on the premise that "[t]he basic distinction drawn . . . between States as market participants and

States as market regulators makes good sense and sound law." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436 (1980).

A recent decision has cast significant doubt on this proposition. When faced with deciding the validity of the Trademark Remedy Clarification Act, 15 U.S.C. § 1125(a), which permitted suits against States for misleading advertising, a majority of the Court concluded that the Act unconstitutionally violated the States' sovereign immunity. *See College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (1999). To reach that conclusion, the Court flatly rejected the argument that States were subject to suit merely because they had entered a market as commercial participants.

> The "market participant" exception to judicial created dormant-Commerce-Clause restrictions makes sense because the evil addressed by those restrictions—the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens . . . is entirely absent where the States are buying and selling in the market. In contrast, a suit by an individual against an unconsenting State is the very evil at which the Eleventh Amendment is directed—and it exists whether or not the State is acting for profit, in a traditionally "private" enterprise, and as a "market participant." In the sovereign-immunity context, moreover, "[e]venhandedness" between individuals and States is not to be expected: "The constitutional

role of States sets them apart from other employers and defendants."

Id. at 2230–31 (1999) (quoting Welch v. Texas Dept. of Highways and Pub. Transp., 483 U.S. 468, 477 (1987)) (other citations omitted). No matter how the Court chooses to resolve whether *Parker* contains a market participant exception, the importance of the question is striking—especially when more and more States are entering commercial markets. *See, e.g., Id.*; *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 119 S. Ct. 2199 (1999)

B. Declining Review Would Bring Undesirable Consequences for Federalism and Local Government

The importance of the Question Presented is also underscored by the undesirable consequences that would follow if this Court declines to review the decision below. Perhaps the most serious consequences will flow from the "intolerable legal uncertainty," *Waters* v. *Churchill*, 511 U.S. 661, 692 (1994) (Scalia, J., concurring in the judgment), engendered by a direct conflict among four circuits on a point of law as essential as the standard for determining the presence of local antitrust immunity. Declining review would mark a substantial departure from this Court's practice of seeking to resolve important points of law that have lapsed into uncertainty. *See, e.g., United States* v. *Cowden Mfg. Co.*, 312 U.S. 34, 36 (1941); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 24 (1991) (Scalia, J., concurring in the judgment). The need for certainty is heightened where, as here, an intercircuit conflict leaves sovereign States uncertain of their rights and obligations under federal law.

In addition, by framing the standard of local antitrust immunity in terms of whether a State statute "necessarily contemplates," Pet. App. 7, anti-competitive activity, the court of appeals has presented States in the Fifth Circuit with a Hobson's choice. State legislatures there can review the statutes governing their political subdivisions *in toto* and amend them one-by-one, to ensure that they contain sufficiently emphatic statements of their intent to authorize anticompetitive conduct. Or they can avoid this federally-mandated spring housecleaning by accepting the risk that political subdivisions engaging in anticompetitive conduct will almost certainly face federal antitrust litigation, with its attendant costs. Either choice deprives States and their subdivisions of a substantial degree of autonomy. This result is especially ironic, given this Court's determination that "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350–51 (1943).

If left unreviewed, the decision below threatens to undermine the salutary effects of this Court's recent federalism decisions. Over the past eight years this Court has breathed new life into federalism in decisions under the Commerce Clause, *United States* v. *Lopez*, 514 U.S. 549 (1995); Section 5 of the Fourteenth Amendment, *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); the Tenth Amendment, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991); *New York* v. *United States*, 505 U.S. 144 (1992); *Printz* v. *United States*, 521 U.S. 898 (1997); the Eleventh Amendment, *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); and in a trio of decisions applying the principle of state sovereign immunity, *Alden* v. *Maine*, 119 S. Ct. 2240

(1999); *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2230–31 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 119 S. Ct. 2199 (1999). Taken as a group, these cases leave States and their political subdivisions freer to operate without federal oversight and control. The decision below accomplishes exactly the opposite results.

The Fifth Circuit defended its holding, in part, on the ground that inferring local antitrust immunity too readily can harm the values and interests protected by federalism.

> To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant.

Id. at 9–10. By appearing to defer to principles of federalism, this reasoning has some superficial appeal. On closer examination, however, the court's argument collapses.

The court wrote that federalism required it to avoid finding *Parker* immunity for State political subdivisions too easily because doing so would "creat[e] an instrument of local government with power the state did not intend to grant." *Id.* If the Fifth Circuit is right, States will have to massively restructure their conduct to satisfy federal law. Any attempt by a political subdivision to act in noncompetitive ways would be shielded from federal

antitrust liability only if the State legislature specifically authorized the precise act at issue. On the other hand, a less grudging view of local antitrust immunity would allow States and their political subdivisions to act without fear of federal antitrust liability, unless a State legislature specifically wishes to bar a political subdivision from acting anti-competitively and passes a statute to that effect. With all due respect, it is the Fifth Circuit whose decision "stand[s] federalism on its head." *Id.* at 9.

II. The Lower Court Decision Is Marred by Substantial Errors that Require this Court's Prompt Correction

While it is true that "the correctness or erroneousness of the decision below is not meant to be the central focus of the Court's exercise of its certiorari jurisdiction," ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 193 (7th ed. 1993), the Court's decisions tend to establish that "a showing of the importance or unimportance of review may be dependent upon whether the decision below is to be accepted or overturned." *Id.* at 195. For that reason we have included a brief discussion of what we regard as the lower court's more prominent errors.

The Fifth Circuit chiefly erred in two ways. First, it reverted to a superseded statement of the rule governing local antitrust immunity. In specific, it tacitly rejected the Court's post-*Lafayette* decisions, which clarify the standard of local antitrust immunity in terms of the "'foreseeable result' of what the [State] statute authorizes." *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 373 (1991).

Second, the court smuggled into its statement of that standard the concept of compulsion. It accomplished this impressive feat of legerdemain by adding the adjective "necessarily" to the old rule that local antitrust immunity exists when "'the legislature contemplated the kind of action complained of.'" *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion) (footnote omitted) (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)). "Necessarily" implies that local antitrust immunity exists only if a State legislature *compels* its political subdivisions to engage in anticompetitive conduct. Yet this Court unanimously rejected an invitation to include compulsion as an element of local antitrust immunity 14 years ago.

> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of statute of this kind.

Town of Hallie v. *City of Eau Claire*, 471 U.S. 34, 43 (1985). Given this Court's rejection of compulsion as a "prerequisite" to finding *Parker* immunity for State political subdivisions, the Fifth Circuit's attempt to frame the standard of local antitrust immunity in terms of "necessity," a term of compulsion, is manifestly erroneous.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation urges the Court to grant the petition.

Respectfully submitted,

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